IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] //

IGOR A. IVANOV, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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Petitioner, Igor A. Ivanov, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming his conviction in the United States District Court for the District of New Jersey of conspiracy to transmit to the Soviet Union information relating to the national defense of the United States.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1967. By order of October 25, 1967, Justice Brennan extended the time for filing the petition for certiorari to and including November 27, 1967. By order of November 14, Justice Brennan extended the time for filing the petition for certiorari to and including December 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the Jencks Act's limiting phrase "relates to the subject matter as to which the witness has testified", should be defined to require production not only of materials touching directly upon the testimony given on direct examination, but also materials dealing with the facts enumerated during and matters necessarily comprehended within the direct, materials useful for impeachment for bias, interest, and defects of memory and perception, and materials related to the subject matter of the indictment.

2. Whether the unilateral action of a government agency, in this case the United States State Department, in placing witnesses to the events charged in the indictment beyond the reach of the defense through an expulsion order entered before a criminal defendant had bail or counsel, prejudices the defendant's right to meet the charge, to effective assistance of counsel, and to compulsory process.

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[1] No question is raised concerning illegal electronic surveillance, on the assumption that the Solicitor General will, if there was any, disclose its presence. See Petition for Rehearing, *Kolod* v. *United States*, No. 133, October Term, 1967.

3. Whether the actions of a chauffeur in performing chauffeur duties during three of five meetings between one suspected conspirator and another gives probable cause for the chauffeur's arrest without warrant, and, if so, whether a warrantless search of the car in which he was riding was proper under any of the historic justifications for search incident to arrest. Within this question, is comprehended: (a) whether the "bystander rule" rejected in dictum in *United States* v. *Di Re,* 332 U.S. 581, 593-94 (1948), should be held to violate the Fourth Amendment; and (b) whether the "incident search" rule should be limited to cases in which its historic justifications—weapons, possibility of escape, destruction of evidence, removal of evidence —are present.

4. Whether, if the arrest of petitioner was unlawful, his conviction is supported by the evidence, almost all of which the government adduced during a pretrial F.R.Crim.P. 41(e) hearing to show probable cause for petitioner's arrest.

STATUTE INVOLVED

18 U.S.C. § 3500:

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.

* * * *

STATEMENT

This case involves an alleged conspiracy between an American scientist employed by ITT and four Soviet citizens to transmit to the Soviet government the details of a Strategic Air Command control system known as Project 465-L. See T. 108-59. The characters are: John William Butenko, co-defendant in the court below and Control Administrator for the field operations section of Project 465-L; Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenev, accredited to the Soviet mission to the United Nations, T. 3917, and hence possessing immunity from prosecution; and Igor A. Ivanov, the petitioner, never alleged or shown to have been more than a peripheral participant in the alleged conspiracy,[1a] a Soviet citizen who neither speaks nor writes English and who is employed by the Soviet trading company, Amtorg, as a chauffeur, T. 475-77. T. 3917. Pavlov, Olenev, and Romashin were unin-

[1a] Butenko testified he never met Ivanov, T. 3477, and knew Pavlov only as Lesnikov, someone to whom he would speak about relatives in the USSR. *E.g.*, T. 3432-47.

dicted co-conspirators. They were ordered by the United States State Department to leave the United States shortly after the arrest of Butenko and petitioner on October 29, 1963. Ex. C-20. Pavlov was repeatedly seen meeting with Butenko and was, if the government's evidence below be believed, the principal figure in the conspiracy on the Soviet side.

The government's lengthy and complex proof was addressed to the work of Butenko, the nature of System 465-L, and the activities of the alleged conspirators from April 1963 until the arrest of Butenko and Ivanov on October 29, 1963. The conspirators' activities were proved through the testimony of a number of FBI agents who participated in a carefully planned, coordinated series of surveillances over Butenko and Pavlov. These surveillances concededly included two illegal entries, by stealth, into Butenko's home by FBI agents. T. 3268-3321. The only evidence putting petitioner into the alleged conspiracy may be fairly summarized as follows:[2]

On April 21, 1963, about 6:30 p.m., Ivanov was seen riding on Livingston Street in Northvale, New Jersey in a Chevrolet station wagon registered to Amtorg. He was sitting in the front seat with Pavlov and Olenev. Ivanov and Olenev left the station wagon at a roadside diner and went in for a snack. T. 347-357. They were last seen in the diner at about 7:15. T. 483-85. There was no other evidence of their activity that evening. After leaving Olenev and Ivanov, Pavlov drove the station wagon to Closter, New Jersey, six miles away, drove into a supermarket parking

[2] The testimony relating to Ivanov was printed as an "Appendix to Appellant's Brief" in the Court of Appeals on file in this Court.

lot, got out of the station wagon and into Butenko's parked car where Butenko was sitting, and then returned to the station wagon. T. 360-64, 535-39. Between 8:00 and 9:15 p.m., Pavlov and Butenko were seen having dinner at a restaurant in Closter. T. 364-66.

On May 26, 1963, at about 4 p.m., Pavlov was seen driving the Amtorg station wagon north near the toll both at the Fort Lee, New Jersey, entrance to the Palisades Parkway, with Olenev as his passenger. T. 604-06. At about 6 p.m., Ivanov was seen driving the Amtorg wagon in Closter, New Jersey, with Pavlov and Olenev as passengers. Ivanov drove around Closter for about 20 minutes. At 6:52 p.m., the Amtorg wagon was seen, with only Pavlov in it, driving south on Piermont Road in Closter, followed by Butenko driving his own car. The two vehicles passed by Ivanov and Olenev, who were standing in front of the Old Hook Inn on Piermont Road. At 7:15 p.m., the station wagon pulled into a parking lot alongside the Old Hook Inn, Ivanov and Olenev got in, and the station wagon drove north on Old Hook Road. T. 612-19, 667-734. Between 8 p.m. and 9:30 p.m., Pavlov and Butenko were seen dining in the Florentine Garden Restaurant, seven miles away from the Old Hook Inn. T. 678-80, 802-03.

On May 27, 1963, Ivanov was observed by the FBI leaving the Soviet United Nations Mission Building on 67th Street in New York City and walking toward Third Avenue. T. 897-99.

The FBI conducted additional surveillances of meetings of Pavlov and Butenko between May and October, apparently without ever seeing Ivanov. On May 27,

Butenko and Pavlov apparently met in Fort Lee, New Jersey, at about 8 p.m. T. 814, 825-26, 837-38, 887-89, 3614. On September 23, Butenko drove in a circuitous manner around the streets of Ridgewood, New Jersey. T. 910-20. On September 24, he repeated the same driving pattern, eventually meeting Pavlov that evening at about 8:20 p.m. Pavlov and Butenko were seen to meet again later that same evening. T. 922-25, 3620-25.

As of October 29, 1963, the above constituted the total of all the evidence gathered by the FBI about Ivanov, or at least all the evidence which was presented at the trial. On October 29, 1963, FBI Special Agent Edmund J. Birch filed a complaint with the United States Commissioner for New Jersey and obtained an arrest warrant for Butenko on charges of conspiracy to violate 18 U.S.C. § 794(a). T. 35-38, App. to Appellant's Brief, p. 24a-32a. Ivanov, Pavlov, Romashin, and Olenev were named in the complaint as co-conspirators, but no warrant was sought for their arrest. The government contended, during a pretrial hearing, that there was no probable cause for the arrest of Ivanov as of the afternoon of October 29. T. 72-73.

The subsequent events of October 29 thus loom large, for they form the principal basis for the Govenrment's proof of conspiracy to transmit information, and at the same time provide whatever support there may be for FBI Agent Parker's on-the-scene decision to arrest Ivanov. On October 29, 1963, Ivanov was first seen about 6 p.m. in Englewood, New Jersey, driving Romashin's 1955 Ford with Romashin and Pavlov as passengers. Ivanov parked the car on Ivy Lane in Englewood, New Jersey, and he and Romashin

walked across the street into a restaurant. Pavlov drove off in the Ford. After a short time, Pavlov returned in the same car and picked up Ivanov and Romashin. T. 1021-25.

At about 7 p.m. that evening, an FBI agent saw the Ford traveling near the railroad station parking lot in Englewood. From 7 p.m. until 8 p.m., the Ford was seen going in and out of the parking lot, sometimes driven by Ivanov and sometimes by Pavlov. T. 1062-66. At about 8 p.m., Pavlov, with Ivanov as a passenger, drove the car into the parking lot, turned off its headlights, turned on its parking lights, and then parked it at the rear of and perpendicular to Butenko's car. T. 1066-67. The two cars remained in this position for about 35 seconds, T. 1125; 1137, though there is no evidence that anything or anyone passed between them. The Ford then pulled out of the parking lot and the Butenko car followed it. The FBI stopped both cars and placed Butenko and Ivanov under arrest. T. 1141, 1156, 1332-33.

FBI Agent Conway testified that he removed an attache case from the back seat of the Ford and took it to the Hackensack FBI office where he inventoried the contents, consisting of two specifications for a portion of Project 465-L. T. 1246, 1291. None of the other agents on the scene saw the case or saw Agent Conway remove it from the car and none testified that there was opportunity for the case to have been passed to the Ford by Butenko. Butenko testified that the case was taken from his car. T. 3456.

The FBI conducted some examination of the interior of the Ford after Ivanov was arrested, and while he was being taken to one of the FBI vehicles at the

scene. The car was again searched in the parking lot of the Hackensack FBI office, while Ivanov was in the office and while he was on his way to the FBI office in Newark, New Jersey. T. 1170-1229; Motions transcript, August 1964, pp. 1-162. The government never obtained a warrant for the search of the Ford, although it did obtain one for a search of Butenko's car.

The items found inside the Romashin Ford included a signalling device, document camera, and related paraphernalia. *Ibid.* The FBI laboratory in Washington, did not find Ivanov's fingerprints on any of these items.

On October 30, 1963, the day after the arrest, the United States State Department caused a note to be sent to the Permanent Mission of the Union of Soviet Socialist Republics demanding that Pavlov, Olenev and Romashin leave the United States on or before November 1, 1963. Ex. C-20. Counsel for Butenko sent a telegram to the State Department asking that the expulsion order be stayed. The State Department, by telegram of November 1, said that the three would be permitted to remain in the United States until November 4, but for some reason not made clear by the evidence below, the three left on November 1. Exs. C-17, 18, 19, 20. During all this time, Ivanov was in jail without counsel.

The indictment charged the defendants and Pavlov, Romashin, and Olenev as unindicted co-conspirators with conspiracy to transmit to the Soviet Government information relating to the national defense of the United States (18 U.S.C. § 794(c)), and with conspiracy to have Butenko operate, in violation of 18 U.S.C. § 951, as an agent for the Soviet Union without

registering as such (18 U.S.C. § 371). Butenko alone was charged with a violation of 18 U.S.C. § 951.

At the trial, the government's case-in-chief was constructed rather like the script of a play. The government proved the FBI agents' observations for each of the surveillance days upon which it chose to rely in the order in which the observations took place. As a result, some of the FBI agents took the stand more than once, and the evidence was heard in small fragments. At the close of each agent's testimony, the government tendered to the defense a copy of the agent's surveillance log covering the surveillance he had just testified to. The government withheld from the defense other logs and reports of other surveillances of the same defendants and their alleged co-conspirators conducted at other times and on other days. The Court read this withheld material and denied defense motions for its production for use in cross-examination. See Exs. C-1 through C-14; see also, *e.g.*, T. 366-77, 485-500, 539-42, 590-92, 606-07, 619-36, 680-82.[3]

The jury found both defendants guilty on all counts in which they were charged. The United States Court of Appeals for the Third Circuit reversed Ivanov's conviction on Count II for want of evidence.

REASONS FOR GRANTING THE WRIT

1. This case presents, in a context amenable to the drawing of persuasive and rational distinctions, the precise, narrow question of the scope of 18 U.S.C. § 3500(b)'s limiting phrase, "relates to the subject

[3] The objections thus preserved were presented to the Court of Appeals by petitioner's co-defendant, whose appeal was consolidated with petitioner's, and were decided in the opinion reprinted in the Appendix.

matter as to which the witness has testified," a phrase apparently drawn from this Court's opinion in *Jencks* v. *United States,* 353 U.S. 657, 669 (1957). The meaning and scope of this phrase has never been passed upon by this Court, and the opinions of the Courts of Appeals present a bewildering array of interpretations reaching concrete results upon no very clear general principle. Important also in this context is this Court's recent reaffirmation of the desirability of maximum disclosure by the government to make possible full and searching cross-examination not only upon the narrow factual matters raised in the examination-in-chief, but also upon collateral matters touching bias and interest, and matters of capacity and recollection going to the weight of the witness's direct testimony. See generally *Dennis* v. *United States,* 384 U.S. 855 (1966). See also 3 Wigmore, *Evidence,* §§ 89-95 (3d ed. 1940).[4]

Examination of the record reveals the factual basis for the question presented. In this case, a number of FBI agents, directed by the Espionage Squad in New York City, conducted a lengthy and intensive investigation of the suspected conspirators. This investigation included a number of physical surveillances, as the withheld Jencks material in Court Exhibits 1 through 14 reveals.

Consider, as but one example, the testimony of FBI Special Agent McDougal. On May 26, 1963, Agent McDougal was posted in a construction trailer with

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[4] Moreover, the witnesses whose prior statements were withheld in this case were agents of the government, a party to the litigation. This Court has recognized that the need for cross-examination and the permissible scope of cross-examination in such a case is greater than with the ordinary witness. *Rea* v. *Missouri ex rel. Hayes,* 84 U.S. 532 (1873).

binoculars, to watch for evidence of the alleged conspiracy. At a distance of 100 yards, he saw a "1962 blue Chevrolet station wagon with three occupants", whom he named as Igor Ivanov, Vladimir Olenev, and Gleb Pavlov. He went on to describe Olenev as "dark hair, receding hair line, approximately 37, 38 years of age, and about five-eight or five-nine." Pavlov he described as "sandy hair, five feet eleven, six feet tall, roughly 175 or 180 pounds." T. 612-14. On cross-examination, McDougal had to admit that his description of the three, including their names, was garnered from prior surveillances, including some which he had himself conducted. T. 646-61. Yet the trial court denied production of the reports made by McDougal covering those prior surveillances. T. 619-36.

Add to this that the testimony of McDougal was given more than a year after his observation of May 26, 1968, and after he had conducted many more surveillances. The conduct of the FBI agents in making a warrantless arrest, and then a warrantless search of the car—as compared to the search of Butenko's car for which they obtained a warrant[5] — suggests, moreover, that the decision that Ivanov was criminally culpable may not have been made until October 29. Once such a decision is made, of course, many subtle forces are bound to operate upon the minds of those who know they are to be witnesses.[6]

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[5] Although there was, in addition, a warrantless search of Butenko's car at the point of arrest.

[6] For example, the agent who saw Ivanov and Olenev standing in front of the Old Hook Inn on May 26 testified that their heads turned to follow the Pavlov and Butenko automobiles that pasesd by them. This bit of information, which the agent regarded as "significant", was not in the agent's surveillance report for May 26.

As Agent McDougal admitted, his testimony about the May 26 surveillance embodied his perceptions from earlier surveillances.[7] That fact alone required production of the reports of those earlier surveillances, for as this Court said in *Jencks,* 353 U.S. at 667:

> "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

As to the reports on surveillances conducted after May 26, it is clear from the government's evidence that the FBI was engaged in a continuous process of investigation designed to bring the alleged conspirators to book, and involving the continual reinterpretation, in the light of subsequent observations and conclusions, of data earlier obtained. Agent McDougal's October 1964 testimony about May 26, 1963 perceptions was inevitably influenced by these later observations, and cross-examination would to that extent benefit from production of the later reports. The dangers of a change in remembered perception are not unlike those arising from repeated interviews with the government about a single event, reports of which were held producible in *Ogden* v. *United States,* 303 F.2d 724, 735-36 (9th Cir. 1962).

When it is considered, moreover, (1) that Ivanov never admitted that he was present at the May 26

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[7] This Court's opinion in *United States* v. *Wade,* 388 U.S. 218 (1967), underscores the importance of full and effective cross-examination when a prior identification is in issue. Nor were Agent McDougal's observations of Ivanov the only ones testified to. See, *e.g.,* T. 729, 758-66.

meeting, (2) that Agent McDougal's purported observation of him at that time was made under not very advantageous conditions, and (3) that intervening between all the surveillances and the October 1964 testimony was the FBI's October 1963 conclusion that Ivanov was probably guilty, it becames impossible to gainsay the cross-examination utility of the agent's reports of all of his surveillances.

In this case, the events observed and described by the agents place Pavlov and Butenko at the center of a conspiratorial design. At trial, however, the government sought to place Ivanov as close to the center of activity as the evidence would admit. Production of the agents' reports dealing with other surveillances would reveal that the FBI itself regarded Ivanov as a peripheral figure. Indeed, even with limited production of reports defense counsel was able to make some point of this fact.[8] If one purpose of cross-examination is to place the direct testimony in context, then the agents' testimony could be evaluated only in the context of the integrated course of concerted conduct which comprised the investigation of the conspiracy charged in the indictment. The government always insists that the bits and pieces of evidence which typically make up a conspiracy case should be seen in perspective to be given their full weight.

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[8] Cross-examination revealed that one agent made a log sheet for Olenev and one for Pavlov, but none for Ivanov. T. 520-21. Further, production of other log sheets would have illustrated the same practice, as well as highlighting the absence of the alleged conspirators from places the FBI expected them to be. This latter point might well have provided negative evidence to rebut the inference of FBI omniscience inevitably raised by the way the government put in its proof. *Cf.* 2 Wigmore, *Evidence* § 664 (3d ed. 1940).

The defense must equally be given the chance to put matters in perspective. *Dennis, supra,* 384 U.S. at 873. Here the "constitutional questions . . . close to the surface" of *Jencks* begin to become patent. *Palermo* v. *United States,* 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring).

Turning to the more general considerations underlying a decision on production under the Jencks Act, the limiting phrase "relates to the subject matter as to which the witness has testified," was chosen by the Congress with little explanation in the legislative history about its scope and meaning. The phrase is, however, almost identical to that employed by the Court in the *Jencks* opinion:

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate *to the testimony of the witness.*" 353 U.S. at 669 (emphasis added).

The Court went on to distinguish admissibility, under the rules of materiality, relevancy, and inconsistency, from the standard thus enunciated, making clear that producibility is broader than admissibility. *Ibid.*[9] Indeed, it may be argued that insertion by the Congress of the phrase "subject matter" evinces an intention to broaden the range of producible materials beyond the *Jencks* opinion.

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[9] This Court briefly alluded to the relationship between "relevancy" in an evidentiary sense and producibility under the Jencks Act in *Campbell* v. *United States,* 373 U.S. 487, 493 n. 7 (1963), observing that two questions are "closely related", and citing *United States* v. *Berry,* 277 F.2d 826 (7th Cir. 1960). As to "inconsistency", see *United States* v. *Borelli,* 336 F.2d 376, 390-91 (2d Cir. 1964).

Lower court opinions are no more helpful than the legislative history. The Ninth Circuit has spoken very broadly:

> "The problem is not whether a question framed precisely in the terms of the withheld material would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter." *Ogden* v. *United States,* 303 F.2d 724, 740 (9th Cir. 1962).

The Eighth Circuit, in *Hance* v. *United States,* 299 F.2d 389 (8th Cir. 1962), took a more restrictive view in holding reports of an undercover agent of the Secret Service not producible under the statute, even though made during a counterfeiting investigation which led to the arrest of the defendants and involving the subject matter of the indictment.

Other courts have relied upon the language of the Senate Report on the Jencks Bill and have said that the statements must relate to "the events and activities as to which a Government agent has testified at the trial." S. Rep. No. 569, 85th Cong., 1st Sess., p. 2. Examples include *United States* v. *Cardillo,* 316 F.2d 606 (2d Cir. —), *cert. den.*, 375 U.S. 822 (1963), although in *United States* v. *Simmons,* 281 F.2d 354 (2d Cir. 1960), the Second Circuit upheld nonproduction of a statement made by a bank robbery witness on *the same day* as the robbery on the ground that the statement did not "relate to" the direct testimony of the witness. Broader standards appear to govern when the material may have impeachment value. *E.g., Rosenberg* v. *United States,* 360 U.S. 367 (1959), *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964).

Some rationalizing principle is clearly needed. Faith to the teaching of *Dennis* would dictate that the phrase "relate to the subject matter" be given the broadest reading. The following guidelines might be developed in the course of full briefing and argument:

a. The defense is clearly entitled to statements otherwise producible which are prior accounts of the very matters touched upon in the direct examination, and to materials dealing with related factual areas which might tend to qualify the direct testimony or place it in context. *E.g.,* in *United States* v. *Ellenbogen,* 341 F.2d 893 (2d Cir. 1965), a fraud case, a government witness testified about dealings with a bidder on government contracts, and the Court held that production of prior statements about similar deals with other contractors should have been ordered.

b. Materials which would provide the basis for impeachment for bias, prejudice or other motive to falsify should clearly be produced. This requirement may transcend the Jencks statute. See, *e.g., Giles* v. *Maryland,* 386 U.S. 66 (1967).

c. Materials which would facilitate cross-examination touching upon the witness' knowledge, opportunity to observe, capacity, basis of recollection, experience used to evaluate the incidents testified to, and other matters generally falling as well under the head of impeachment, but concerned not with motive to falsify. See generally Wigmore, *Evidence,* §§ 989-95 (3d ed. 1940).[10] In this regard, the prior statements of a witness provide a uniquely valuable weapon to the

[10] Indeed, the illustration from *Langhorn's Trial,* given by Wigmore, § 995 at 635-36, bears a resemblance to the government's mode of proof in this case.

cross-examiner, for they possess many of the advantages of extrinsic aids to testimonial impeachment, such as the testimony of another that the defendant failed on a prior occasion accurately to observe an event, without requiring, as would extrinsic proof, the calling of other witnesses for the trial of collateral issues. Compare *Palermo*, 360 U.S. at 365 (Brennan, J., concurring). All of these areas are traditionally regarded as appropriate for cross-examination, even under the federal rule which limits it in scope to the examination-in-chief.

A standard calling for production of all prior statements helpful in these areas might well be phrased to require production of all reports touching upon those aspects of the preindictment investigation which relate to the subject matter of the indictment. Alternatively, the test in *Ogden, supra,* 303 F.2d at 740, might be taken as a starting point. Neither test would require turnover of the investigative file in every case, as was feared by the Congress and as the Jencks Act was designed to prevent. See generally *Palermo* v. *United States,* 360 U.S. 343 (1959). Every investigation involves false leads, interviews which produce nothing useful to the government and do not even concern the charges eventually brought or the persons eventually charged.

Cross-examination, apotheosized by Anglo-American writers on evidence as the greatest device known to judicial science for the discovery of truth, is not subject to uniform and precise analysis. Materials deadly in the hands of one advocate make no impression in the hands of another. What is plain is that the defense is entitled to all relevant aid in testing the govern-

ment's case. Perhaps clarification of the Jencks standard would put to rest the practice commented upon by Judge Friendly [11] in *United States* v. *Borelli*, 336 F.2d 376, 393 (2d Cir. 1964):

> "We add our wonder at the Government's willingness, not unique to this case, to imperil convictions hoped to be obtained after immense effort, by cavilling over the delivery of such a paper, whose admissions would not add appreciably to the strength of the defense, but whose erroneous exclusion might lie just beyond an appellate court's power of rescue under the harmless error rule."

2. As recounted in the Statement, *supra*, the three unindicted co-conspirators were ordered by the State Department to leave the United States, and did so on November 1, 1963.[12] By this means, the defense was deprived of all opportunity to attempt to secure the cooperation of the three in meeting the charges of the indictment, thus raising an issue under the Sixth Amendment not analytically different from that considered by this Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957), and by the Second Circuit in, *e.g.*, *United States* v. *Coplon*, 185 F.2d 629 (1960), cited with approval in *Dennis*, *supra*, 384 U.S. at 874, n. 20.

The three expellees, as accredited diplomatic representatives of the Soviet Union, had certain immunities

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[11] Echoing Mr. Justice Brennan in *Palermo*, 360 U.S. at 365-66.

[12] Apparently this action by the Department was not unpremeditated. At around the same time, similar treatment was given to other Soviet nationals who had previously been indicted for espionage but were afterwards conceded to have diplomatic status and immunity. See *United States* v. *Egorov*, 232 F. Supp. 732 (E.D.N.Y. 1964).

under Section 15 of the United Nations Headquarters Agreement, 61 Stat. 756, and under 22 U.S.C. §§ 252-53. Some immunity from compulsory process and absolute immunity from criminal prosecution is conferred by these provisions. See, *e.g., Hellenic Lines, Ltd.* v. *Moore,* 345 F.2d 978 (D.C. Cir. 1965); *United States ex rel. Casanova* v. *Fitzpatrick,* 214 F. Supp. 425 (S.D. N.Y. 1963).

But it is also clear that, had the three remained in the United States, they had it in their power to discuss the case with the defense, and even to testify *if they wished to do so.* The former they might do just as any witness might; the latter they could do because, although it is usually for a diplomat's government to waive the immunity or not, if the diplomat decides to appear and testify, the court will not interfere. That is a matter between the diplomat and his government, as is made clear in *Banco de Espana* v. *Federal Reserve Bank,* 28 F. Supp. 958, 972 (S.D.N.Y. 1939), *aff'd,* 114 F.2d 438 (2d Cir. 1940).

By ordering the three from the country, the State Department effectively put the entire matter of the witnesses' cooperation or noncooperation with the defense into the hands of the Soviet government and deprived the three of any voice they might have had in the matter. That the State Department may have had sound policy reasons behind its decision is not at all in issue. The informer's privilege in *Roviaro* and the need to protect state secrets in *Coplon* were equally with the policy expressed in the expulsion order important to the welfare of our government. But when government seeks a conviction for crime, it must sometimes choose between conflicting policies. *Roviaro* and

Coplon tell us that the choice cannot be at the defendant's expense.

In this context, the reasoning of Judge Goodman in *United States* v. *Powell,* 156 F. Supp. 526 (N.D. Calif. 1957), is persuasive. There the defense needed the assistance of persons in the People's Republic of China, and the government was ordered to choose between its policy of not validating passports for travel there and its desire to prosecute the defendants for sedition.

It would be a mistake to conceive this issue as one solely of compulsory process, as did the government in the court below. At stake here are a closely-related complex of values, imperfectly expressed in the phrase "adversary system", and given constitutional dimension in the Sixth Amendment. This case involves the right to confrontation, to meet and probe the government's case. *Dennis* v. *United States,* 384 U.S. 855, 870-71 (1966); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *Alabama,* 380 U.S. 415 (1965). The right to effective assistance of counsel for one's defense, given new recognition in *United States* v. *Wade,* 388 U.S. 218 (1967), is also present, in the sense that counsel must not be hindered in the gathering of relevant facts.[13] Policies akin to those behind the Sixth Amendment vicinage requirement are also at stake here, for there

[13] The State Department's action constituted a procedural impediment to effective assistance analogous to those at issue in *Powell* v. *Alabama,* 287 U.S. 45, 57-58 (1932); *Tinkle* v. *United States,* 254 F.2d 23 (8th Cir. 1958); *United States* v. *Koplin,* 227 F.2d 80 (7th Cir. 1955); *Willis* v. *Hunter,* 166 F.2d 721, 723 (10th Cir.), *cert. denied,* 334 U.S. 848 (1948) ("effective assistance" requires lawyer to have "ample opportunity to acquaint himself with the law and the facts").

is little practical difference between forcing a defendant to trial at a distance from his home and placing his potential witnesses beyond his reach.[14]

In sum, the government's conduct has raised an issue of first impression in this Court, amenable to resolution within the framework of this Court's recent decisions strengthening the adversary system in criminal litigation.

3. Question 3 arises from the warrantless arrest of petitioner, at about the same time as an arrest under warrant of Butenko, followed by a search of the Ford automobile in which petitioner was riding. The search, if justifiable at all, is so only as incident to the arrest.

The standard for a warrantless arrest is not yet clear, despite the extensive judicial literature.[15] This Court has before it the "stop and frisk" cases of *Peters, Sibron,* and *Terry,* Nos. 63, 74, and 67, set for argument during the weeks of December 4 and 11, and these cases may provide vehicles for re-evaluation of the classic theory of arrest which was the subject of the Court's earlier decisions in, for example, *Henry* v. *United States,* 361 U.S. 98 (1959) and *Johnson* v. *United States,* 333 U.S. 10 (1948).

In this case, the issue arises as follows: The arrest was made, FBI Agent Parker testified, because he believed he had witnessed a crime being committed in

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[14] *United States* v. *Cores,* 356 U.S. 405, 410 (1958); *United States* v. *Johnson,* 323 U.S. 273, 275-76 (1944); *Hyde* v. *Shine,* 199 U.S. 62, 78 (1905); *United States* v. *National City Lines,* 7 F.R.D. 393, 402 (S.D. Calif. 1947). See Barber, *Venue in Federal Criminal Cases: A Plea for Return to Principle,* 42 Tex. L. Rev. 39 (1963).

[15] See also 18 U.S.C. § 3052.

his presence when the Butenko car and the Ford were parked near one another in the railroad station parking lot. There is no direct evidence that the occupants of the two vehicles communicated with one another. There is no evidence that Ivanov handled anything in either car.[16] There is no evidence that, even if there was some secret communication hidden from the agent's view, Ivanov had anything to do with it.

This case, on its facts, resembles most closely *United States* v. *Di Re*, 332 U.S. 581 (1948), in which the defendant was arrested as one of three persons sitting in a car, two of whom were engaged in what the police had grounds to believe was an illegal transaction in counterfeit rationing coupons. This Court rejected the theory of "collective guilt" implicit in the government's argument that bystander status alone confers probable cause.

In the present case, the arresting agent's conclusory assertion that when the two cars were parked together in the railroad parking lot "a violation of the espionage law had occurred or was occurring", Motion transcript, p. 55, is not only without support in the record in the sense that nothing was seen to pass from car to car, but signally fails to implicate Ivanov, who during the months of surveillance prior to that observation had been seen doing nothing other than chauffeur's work.

Despite *Di Re*, the concept of bystander guilt once again threatens to gain currency not only by its use in this case but also by its incorporation in the preliminary draft of the American Law Institute's Model

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[16] Even if there were such evidence, it would make no difference, for an arrest is not justifiable based upon what the incident search turns up.

Pre-Arraignment Code, which provided that the police may make dragnet arrests where "it is likely that only one or more but not all of the persons arrested may be guilty of the crime."[17] Now, petitioner respectfully submits, is the time to hold this concept at war with the Fourth Amendment.[18]

As to the subsequent search, this case illustrates the confusion which may be engendered when the "incident search" rule is permitted to outrun its rationale. The first group of FBI agents to testify concerning the search of the Ford said that Ivanov was arrested, taken out of the car and led away to one of the many FBI vehicles on the scene. Agent Conway, according to the FBI testimony, reached inside the Ford and took out an attache case. Motion transcript, pp. 82-83. Other agents may have looked inside the vehicle, a "preliminary search", in the conclusory language of Agent Parker. *Id.* at 80-81. The proceedings on the motion to suppress were then concluded. Several days later, the government sought and obtained leave to present additional evidence. *Id.* at 120-21. Agent Evans testified that, as Ivanov was being led away, he entered the Ford by the passenger door and examined the contents of two paper shopping bags in the rear seat. He said he observed certain items of physical evidence later introduced at trial over defense objection, including the document camera, signalling device,

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[17] Discussed and quoted in Chief Judge Bazelon's letter to Attorney General Katzenbach, Appendix A to Kamisar, *Has the Court Left the Attorney General Behind?*, 54 Ky. L.J. 464, 486 (1966).

[18] See, for an application of the dragnet arrest principle in potentially explosive context, *Trilling* v. *United States*, 260 F.2d 677, 690, n. 11 (D.C. Cir. 1958) (Bazelon, J.)

radio, and so on. He did not, he testified, participate in the arrest of Ivanov. During his ten minute search, he did not even know where Ivanov was. Thereafter, the car was taken to Hackensack for further search, while Ivanov was taken briefly to Hackensack and then on to Newark. *Id.* at 125-51.

The law of "incident search" has been the subject of earnest debate in the opinions of this Court, ranging from Justice Jackson's view in *Harris* v. *United States,* 331 U.S. 145, 197-98 (1946) (dissenting opinion), that courts are unable after the fact to make rational distinctions between what is reasonable and what is not, through Justice Frankfurter's cogent plea for restriction of the rule to the terms of its rationalizing principles, *United States* v. *Rabinowitz,* 339 U.S. 56, 72-73 (1950) (dissenting opinion), to the wide-ranging searches upheld in the cases criticized by Justice Frankfurter in *Rabinowitz.*[19]

There was a hint, no more, in *Preston* v. *United States,* 376 U.S. 364, 367 (1964), following the Court's uncritical repetition of earlier dicta, of a return to the initial justifications for the incident search rule: "the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent destruction of evidence of the crime." *Ibid.* These are the justifications alluded to by Justice Frankfurter, 339 U.S. at 72. Perhaps the need to prevent the fruits and instrumentali-

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[19] This case presents, of course, a warrantless arrest plus warrantless search, so no magistrate ever acted to check the agent's impulses to interfere with the petitioner's liberty. This case is thus different from *Rabinowitz,* in which there was an arrest warrant. See also *Harris* v. *United States;* 370 F.2d 477 (D.C. Cir. 1966), *cert. granted,* No. 92, October Term, 1967.

ties of crime from departing the jurisdiction could be added. *Carroll* v. *United States*, 267 U.S. 132 (1925). But if the rule is permitted a further expansion, it would indeed become unworkable. There would be no law except a series of *ad hoc* trial court judgments, only some of which could in the nature of things be reviewed by appellate courts and only a minute fraction of which would ever find their way to this Court. The Fourth Amendment is not like a rule of civil pleading permitting trial court discretion; it is crucial to the way in which we live our lives in a free society. Taken with other amendments, it defines the limits beyond which government may not go in interfering with our possessions, our papers, our words and our thoughts. Respect for its "imposing provenance" demands that its bounds be carefully delimited.

4. The fourth question is presented in full knowledge that the sufficiency of the evidence in a criminal case is not generally worthy of this Court's review on certiorari.[20] However, since the government put on virtually its entire case in resisting the petitioner's motion under Rule 41(e), Federal Rules of Criminal Procedure, we respectfully suggest that if the Court should hold the arrest to have been without probable cause, it follows ineluctably that the conviction must founder for want of evidence.

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[20] Absent, *e.g.*, some claim of due process denial as in *Thompson* v. *Louisville*, 362 U.S. 199 (1960) or the presence of a First Amendment question as in *Yates* v. *United States*, 354 U.S. 298 (1957).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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